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No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1953

AMERICAN BOTTLING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMERICAN BOTTLING COMPANY, petitioner herein, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, entered on June 30, 1953, which enforced an order issued by the National Labor Relations Board against Petitioner.

OPINIONS BELOW

The *per curiam* decision of the court below (R.I, 238),[1] is reported at 205 F. 2d 421. The decision and

[1] The printed record consists of three volumes, the first entitled Transcript of Record, containing, *inter alia*, the pleadings, Intermediate Report, Exceptions and Decision and Order of the Board; the second entitled Petitioner's Appendix, and the third entitled Respondent's Appendix. The proceedings in the court below have been appended to

order of the National Labor Relations Board (R.I, 153-231), issued May 28, 1952, is reported at 99 N.L.R.B. 345.

JURISDICTION

The judgment of the court below was entered on June 30, 1953 (R.I, 238). A petition for rehearing, filed by petitioner on July 22, 1953 (R.I, 239-242), was denied on August 13, 1953 (R.I, 243). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1251 (1) and under Sec. 10 (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the business of an independently owned and operated local bottler of a nationally advertised soft drink affects interstate commerce within the meaning of the National Labor Relations Act, where all of the bottler's sales are made within the state of its location; where its out-of-state purchases are concededly irrelevant to assertion of jurisdiction under the announced policy of the National Labor

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the first volume. In this petition references to the Transcript of Record are designated "R.I," references to Petitioner's Appendix are designated "R.II," and references to Respondent's Appendix are designated "R.III." Whenever in a series of references a semi-colon appears, references preceding the semi-colon are to findings of the Board or the court below; succeeding references are to the pertinent evidence. These references are to conform to the record below in which the Board was petitioner, and the petitioner here was respondent.

Relations Board,[2] and where the syrup which, with carbonated water, forms the bottler's product is manufactured within the state and delivered to the bottler in an intra-state transaction.

STATUTES INVOLVED

The pertinent provision of the National Labor Relations Act, as amended (61 Stat. 136, 29, U.S.C., Supp. V, 151 *et seq.*) are printed in the Appendix. (Section 2(2); 2(6), 2(7), 8(a)(1), 10(a))

STATEMENT

I. The undisputed commerce facts

Petitioner is an independent Texas corporation, wholly owned by Texas residents (R.III, 26, 27, 103). It operates a plant in Corpus Christi, Texas, where it is engaged in manufacturing and bottling a nationally advertised soft drink, Coca Cola (R.II, 118-126). Petitioner distributes the beverages it

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[2] A part of petitioner's annual purchases of bottles, caps and coolers, valued at $125,000, is made outside of Texas (R.I, 177). No such purchases are from the Coca Cola Company (R.III, 26). However, in asserting jurisdiction over petitioner, the Board placed no reliance upon these out-of-state purchases since, under the Board's publicly announced jurisdictional policy, it refuses to assert jurisdiction on the ground of "Imports" or "Inflow" alone unless such imports are valued in excess of $500,000. See *Federal Dairy, Inc.*, 91 N.L.R.B. 638, and N.L.R.B. *Sixteenth Annual Report*, pp. 15-39. Thus, in its Brief in the court below, the Board conceded that petitioner "did not meet the inflow test of the Board's jurisdictional 'yardstick'" (Br. p. 2).

bottles in several Texas Counties surrounding Corpus Christi (R.II, 119). All of petitioner's sales are made locally in Texas (R. II, 3).

The principal ingredient used by petitioner in manufacturing Coca Cola is Coca Cola syrup. This syrup is made by The Coca Cola Company, a Delaware Corporation, at its plant at Dallas, Texas (R.III, 2, 41). Petitioner, however, does not purchase its syrup (or any other item) from The Coca Cola Company (R. III, 26, 101). It obtains the syrup from Coca Cola Bottling Co. 1903, a Tennessee Corporation with its principal office and place of business at Dallas, Texas. Coca Cola Bottling Co. 1903 purchases Coca Cola syrup from the Dallas plant of The Coca Cola Company and delivers such syrup from the Dallas plant to petitioner at Corpus Christi. All of the syrup utilized by petitioner is manufactured in Texas (R.III, 41-42).[3] There is no evidence that any of the ingredients utilized by The Coca Cola Company at its Dallas, Texas plant in the manufacture of the syrup originate outside of the State of Texas.

The Coca Cola Company manufacturers Coca Cola syrup at various plants throughout the United States, one of which is the plant at Dallas, Texas (R.III, 41). The Coca Cola Company sells the syrup thus manufactured to distributing companies, such as Coca Cola Bottling Co. 1903 (R.III, 41-42). There are six such distributing companies in the United States, each of which is given the exclusive right,

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[3] The Trial Examiner did not mention this undisputed fact in his Intermediate Report. Petitioner specifically excepted to his failure to make this finding (R.I, 116).

within a designated area, to purchase syrup from The Coca Cola Company and resell it to local bottlers (R.II, 9). These distributing companies sell the Coca Cola syrup to local bottlers, such as petitioner (R.II, 122). Each bottler has a contract with a distributing company in which the bottler is given the exclusive right to bottle and distribute Coca Cola within a designated area (R.II, 119).

The contract between petitioner and Coca Cola Bottling Co. 1903, which is typical of agreements between bottlers and distributors of Coca Cola in this country, establishes a base price at which petitioner may purchase syrup, and provides for price adjustments fluctuating with the market cost of syrup ingredients (R.II, 122). The price includes a deposit, figured on a per-gallon basis, for advertising. The bottler selects such advertising media as he desires and his deposit account is charged only for such advertising as he elects to use. The bottler is not required to use any advertising if he does not so desire (R.III, 1).

The contract further provides that Coca Cola Bottling Co. 1903 shall have the right to inspect the bottler's premises for cleanliness and to make quality tests of the product (R.II, 124). The bottler is required to use the distinctive Coca Cola bottles, cap and trademark, and to purchase these supplies from an approved manufacturer (R.II, 124-125). Manufacturers of these products are not connected with The Coca Cola Company.[4]

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[4] Caps, bottles and coolers are all produced by approved manufacturers in the State of Texas, as well as by manufacturers elsewhere (R.II, 3).

The bottler agrees to obtain all of his syrup from the contracting distributor, to sell only in the designated area, and vigorously to push the sale of the beverage (R.II, 125). The distributor, in turn, agrees to furnish the bottler with all of his syrup requirements (R.II, 120).

The contract does not give to the distributor any control over the price which the bottler charges for the beverage or the amount of the deposit which he may require from the customer for the case and bottles.[5]

There is no minimum quota which the bottler must fill. The bottler need not buy any minimum amount of syrup. The contract between the bottler and distributor is not terminable by the distributor except for breach by the bottler of his contract obligation, and then only after notice and failure to correct such default within a period of thirty days (R.II, 125).

On the foregoing facts the Board found that petitioner is an integral part of the multi-state sales and distribution system employed by The Coca Cola Company, and, on this ground alone, held that petitioner "is engaged in commerce within the meaning of the Act." (R.I, 182-185). In support of its finding that petitioner was an "integral part" of the sales and distribution system of The Coca Cola Company, the Board relied entirely upon those provisions of the contract between petitioner and Coca Cola Bottling

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[5] The record shows that prices and deposit amounts charged by bottlers doing business in Texas were varied (R.I, 182).

Co. 1903, which contain "the limitation on the buying of Coca Cola syrup, the restrictions on territorial operations, the required payment for advertising, the limitation on the type of bottles and crowns to be used, and the submission to plant inspection." (R.I, 185).

II. Proceedings before the Board

Following the usual procedures under Section 10 of the Act, the Board issued a complaint (March 13, 1951) against petitioner, alleging that petitioner had violated Sections 8(a)(1)(3) and (5) of the Act. In its answer petitioner specifically denied that its operations affected commerce within the meaning of the Act (R.I, 20-21). Following the usual hearing, the Trial Examiner on November 30, ~~1950,~~ 1951 issued his Intermediate Report, finding that petitioner had committed unfair labor practices (R.I, 173-231). The evidence relied upon consisted of acts and conduct on the part of officials and supervisory employees of the petitioner (R.I, 227). There was no evidence that any officials of The Coca Cola Company, or of Coca Cola Bottling Co. 1903, participated in or were ever aware of the conduct relied on by the Board. (R.I, 217.)

The undisputed evidence showed that petitioner alone controls its labor relations policies, wages, hours and conditions of employment, and that neither The Coca Cola Company nor Coca Cola Bottling Co. 1903 has, or exercises, any control, direct or indirect, in these matters (R.III, 16-27). No of-

ficial of The Coca Cola Company or Coca Cola Bottling Co. 1903 owns any stock in petitioner, nor does any such official hold any corporate position with petitioner (R.III, 103).

Thereafter, on June 30, 1951, the Board issued its decision, substantially adopting the Trial Examiner's recommendations, and finding that petitioner had engaged in additional unfair labor practices not found by the Trial Examiner (R.I, 153). The Board entered its usual order directing petitioner to cease and desist from the unfair labor practices found and to take certain affirmative action (R.I, 167).

III. Proceedings in the court below

On June 30, 1953, the court below entered its decision in which it decreed that the Board's order be enforced. *N.L.R.B. v. American Bottling Co.*, 205 F. 2d 421. In this decision the court, *sub-silentio*, rejected petitioner's contention that petitioner was not subject to the Act. On July 22, 1953, petitioner filed in the court below a petition for rehearing, citing, *inter alia*, the decision of the Court of Appeals for the Sixth Circuit in *N.L.R.B. v. Bill Daniels*, and *N.L.R.B. v. Gilbert Motor Sales, Inc.*, 202 F. 2d 579, and asserting that this decision was in conflict with the decision below. On Aug. 13, 1953, the court below denied the petition for rehearing without opinion.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that petitioner's business affected commerce within the meaning of the Act.

2. In granting enforcement of the Board's order.

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that petitioner's activities affect interstate commerce within the meaning of the Act is in square conflict with the decision of the Court of Appeals for the Sixth Circuit in *National Labor Relations Board v. Bill Daniels, Inc.*, and *National Labor Relations Board v. Gilbert Motor Sales*, 202 F. 2d 579, pending on the Government's petition for certiorari, No. 81, this Term. In the *Daniels* case, the Sixth Circuit held that a local Ford dealer who operated under an exclusive distributor arrangement with Ford Motor Company was not subject to the Act, although the dealer was "tied (by contract) with Ford into a vast national network of an integrated distribution system." Holding that "The circumstances that these dealers made all of their purchases in Michigan and practically all of their sales in Michigan is the controlling fact in the case" (202 F. 2d 579), the court rejected the Board's contention that interstate commerce was affected through the dealer's relations with Ford Motor Company. The court held that a distributor could properly be deemed an "integral part" of a manufacturer's distribution and sales system only if the dealer was either an agent or an employee of the manufacturer.

In the instant case, likewise, petitioner makes all of its sales and relevant purchases in Texas.* Here,

* As we have indicated above, note 2, *supra*, although petitioner makes some purchases of incidental items outside of Texas, the Board regarded these purchases as too

also, there is no claim and no showing that petitioner is either an agent or an employee of The Coca Cola Bottling Company or Coca Cola Bottling Co. 1903. Consequently, the holding of the Sixth Circuit that an exclusive distributorship arrangement does not suffice to transform a local enterprise into an operation affecting interstate commerce is squarely in conflict with the decision below.

2. This Court has recognized the importance of the question here presented, and the conflicting views of the Courts of Appeals as to its proper resolution, by granting certiorari in *Howell Chevrolet Company v. N.L.R.B.*, No. 34, this Term. The Government acquiesced in the grant of certiorari in that case, and has filed a petition for certiorari in the *Daniels* and *Gilbert* cases, supra, No. 81, this Term. In that petition the Government asserts (Pet. p. 16) that "the obviously important issue in these cases as to the jurisdiction of the Board, affecting many of the thousands of sales outlets of a major national industry (and probably affecting similar dealers in other industries as well), requires resolution by this Court."

Since, as the Governmnet correctly observes, the question to be decided in the *Howell* case will affect exclusive dealers, like petitioner, in industries other

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small to warrant assertion of jurisdiction, and predicated its commerce findings exculsively upon the theory that petitioner is a part of the multi-state sales and distribution system employed by The Coca Cola Company. In view of the Board's rationale, the Government is, of course, precluded from attempting to rely upon these incidental out-of-state purchases to support the Board's findings. *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 93-95.

than the automobile industry, we believe that this Court should not restrict its consideration of the issues to relationships arising in the automobile industry, but should simultaneously consider the problem in the light of the facts contained in this record.

3. The instant case reveals the error of the Board's "integrated sales and distribution system" approach far more glaringly than does the record in *Howell*, or in *Daniels* and *Gilbert* in which the Government has applied for certiorari. In all of those cases, while the local dealers purchased their new cars and parts locally, many of the parts were originally manufactured outside of the state and merely assembled or distributed to the dealers locally. The Board relied upon the out-of-state origin of the parts in its decision in those cases (*Daniels*, 96 N.L.R.B. No. 191, *Gilbert*, 97 N.L.R.B. No. 21, *Howell*, 95 N.L.R.B. 410), and the Government's petition for certiorari in *Daniels*, No. 81, this Term, makes much of this fact. The petition argues that a work stoppage at the plant of a dealer would curtail the manufacturer's outlet for out-of-state parts and thereby interfere with the flow of commerce across state lines. (Pet. for cert., p. 17, 19-20.)

In the instant case, however, not only does petitioner purchase all of the Coca Cola syrup locally, but all of the syrup it purchases is manufactured locally, and there is no showing that any of the ingredients of the syrup originate outside the State of Texas. Consequently, there is no basis whatever for argument that a work stoppage by petitioner's employees could have any impact on the movement of articles involved in the production of Coca Cola across state lines.

Thus, the sole basis upon which the Board's assertion of jurisdiction can rest in this case is the "integration" theory urged by the Government at page 18 of its Petition in the *Daniels* case, adopted by the Court of Appeals for the Ninth Circuit in the *Howell* case, by the Court of Appeals for the First Circuit in *N.L.R.B. v. Ken Rose Motors, Inc.*, 193 F. 2d 769, and by the court below in the instant case, but rejected by the Court of Appeals for the Sixth Circuit in the *Daniels* and *Gilbert* cases.

Moreover, tested against the facts contained in this record, the "integration" theory contains flaws not readily revealed by its application in the automobile cases. In the automobile cases the "franchises" relied upon by the Board were clearly designed to enable the manufacturer to stabilize and regularize its own production and sales. In stating the "Question Presented" in the *Daniels* and *Gilbert* cases, the Government emphasized (Pet. pp. 2-3), that the dealer agreements with Ford were intended "to enable Ford to schedule its production effectively," and that "Pursuant to this agreement respondents regularly advise Ford of their anticipated needs of automobiles, parts and accessories." In the instant case, however, the arrangement between the bottling companies, the distributing companies and The Coca Cola Company are not designed or intended to facilitate scheduling of syrup production (R.II, 118-127). Bottlers order Coca Cola syrup for current use only (R.III, 41); there is no showing that they ever advise Coca Cola Bottling Co. 1903 in advance of future needs, or that Coca Cola Bottling Co. 1903 advises The Coca Cola Company of its future syrup demands.

In addition, bottlers of Coca Cola, like petitioner, unlike automobile dealers, are not restricted to trading in one product (R.III, 26-27); their contracts are not cancellable at the option of the manufacturer without cause (R.II, 118-127); the contracts do not regulate the relationship of the bottler to the public (R.II, 118-127); the bottlers are not required to maintain an approved inventory (R.II, 118-127); the bottlers select their own advertising media and pay only for such advertising as they elect to use (R.III, 1); and the bottlers are not required to report on their financial status or other business matters to the manufacturer (R.II, 118-127).

Since the issue is whether, as the Board holds, a degree of control exercised by a manufacturer or distributor over a dealer, through contract, suffices to subject the dealer to the reach of the Act, this Court should consider the validity of the Board's doctrine not only where, as in the automobile industry, the degree of control is relatively substantial, but also where, as here, the relationship between bottler, distributor and manufacturer is infinitely more tenuous.

4. To the extent that the Board and the court below relied upon the relationship between petitioner and Coca Cola Bottling Co. 1903 and The Coca Cola Company to establish that petitioner's operations affect interstate commerce, the decision below is squarely in conflict with the decision of the Court of Appeals for the Tenth Circuit in *N.L.R.B. v. Shawnee Milling Company, d/b/a Pauls Valley Milling Company*, 184 F. 2d 67 (C.A. 10). In that case the respondent, Shawnee Milling Company, operated a flour mill at Shawnee, Oklahoma, from which

products were shipped in interstate commerce. Shawnee also operated a branch plant at Paul's Valley, Oklahoma, under the trade name "Pauls Valley Milling Company." The Pauls Valley plant was operated by a local manager, subject, however, to overall supervision as to labor relations and other policies by officers of the Shawnee Company. All purchases and sales by the Pauls Valley Milling Company were made within the state of Oklahoma.

Conceding that the operations of the Pauls Valley plant did not affect interstate commerce, the Board, nevertheless, asserted jurisdiction over unfair labor practices committed there on the ground that the Pauls Valley Milling Company was "not a separate entity, but * * * merely a trade name for an integral part of (Shawnee's) business." 82 N.L.R.B. 1266, 1278, n. 6.

The Court of Appeals held, however, that because there was no showing that "a labor disturbance in the Pauls Valley plant would have an impact upon the operations at the Shawnee plant, or that the discontinuance of operations at Pauls Valley would cast undue burden upon the operations of the plant at Shawnee," the Board was without jurisdiction over the Pauls Valley operation.

If, as the Tenth Circuit holds, even direct ownership and active supervision of an intrastate operation by an interstate company does not make the intrastate operation subject to the Act, then, even more clearly, the mere existence of a contractual relationship between an intrastate enterprise and one which operates interstate does not bring the former within the scope of the Act.

The test applicable here, we submit, is the test applied by the Tenth Circuit in *Shawnee*, namely, whether a labor dispute affecting petitioner's operations would have an impact upon the movement of goods or services across state lines. Here, as in *Shawnee*, since petitioner's sales and relevant purchases are all made locally, and since the ingredients utilized by petitioner are all produced locally, labor disturbances could have only local impact.

To depart from this critical test of jurisdiction, as did the Board and the court below, is to repudiate the approach uniformly taken by this Court to jurisdictional questions arising under the National Labor Relations Act from *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, to *N.L.R.B. v. Denver Bldg. and Construction Trades Council*, 341 U.S. 675, 683-685. To discard that guide would truly, in the words of this Court, "effectually obliterate the distinction between what is national and what is local." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, at page 37.

5. The principal fallacy of the Board's "integration" approach, which has now been approved explicitly by the Courts of Appeal for the First and Ninth Circuits, and *sub-silentio* by the court below in this case, lies in its departure from the standard established by Congress, namely, that an employer is subject to the Act only if *his own operations* affect interstate commerce. See Section 2(2), 8(a)(1) and 10 (a). Consequently, as the Sixth Circuit held in *Daniels* and *Gilbert*, *supra*, unless an intrastate employer is the agent or employee of an interstate concern, so that it may be held that the interstate con-

cern is actually the "employer' within the meaning of the Act, jurisdiction may not be exercised over the intrastate business. Thus, judged by the statutory standard, petitioner, whose operations clearly do not affect interstate commerce, cannot be deemed subject to the Act. And since petitioner alone, not The Coca Cola Company or Coca Cola Bottling Co. 1903, is the employer charged by the Board with unfair labor practices, the Board's order necessarily falls.

This is not to say, of course, that Congress would be powerless to reach or to regulate even purely intrastate business, such as petitioner's, if such regulation were necessary to effectuate a program of regulation of interstate concerns. See "The Shreveport Rate Cases," *Texas & Pacific Railway Co. v. United States; Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342; *Wickard v. Filburn*, 317 U.S. 111, and *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219. But Congress has not in the National Labor Relations Act declared that regulation of unfair labor practices by employers whose own activities do not affect interstate commerce is necessary to effectuate its policy of regulating the labor relations of interstate concerns. On the contrary, Congress has carefully in this statute preserved the line between what is national and what is local. It is not for the National Labor Relations Board to obliterate the line that Congress drew. *Colgate-Palmolive-Peet Co. v. National Labor Relations Board*, 338 U.S. 355, 363-364.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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SEPTEMBER 10, 1953

APPENDIX

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151 *et seq.*) are as follows:

DEFINITIONS

Sec. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to sections 151-163 of Title 45, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(6) The term "commerce" means trade, traffic, commerce transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country, any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burden-

ing or obstructing commerce or the free flow of commerce.

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 330

AMERICAN BOTTLING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* decision of the court below (R.I. 235) [1] is reported at 205 F. 2d 421. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R.I. 153-172, 173-231) are reported at 99 NLRB 345.

JURISDICTION

The judgment of the court below (R.I. 236) was entered on June 30, 1953. The court below denied

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[1] The volume entitled Transcript of Record, to which has been added the proceedings in the court below, is denoted "R.I."; the volume entitled Petitioner's Appendix, "R.II."; and the volume entitled Respondent's Appendix, "R.III."

petitioner's request for rehearing on August 13, 1953 (R.I. 241). The petition for a writ of certiorari was filed on September 10, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Petitioner, in the conduct of its business, makes all of its sales locally, but annually receives a substantial quantity of supplies direct from out-of-state. These out-of-state purchases suffice to bring petitioner within the coverage of the Act. In the exercise of its discretionary power to withhold the full measure of its legal jurisdiction, however, the National Labor Relations Board does not generally assert jurisdiction over such a business unless other factors exist. One of these factors is that the business serves as an essential link in a multistate system of manufacture and distribution. The question presented is whether the Board properly applied this standard in deciding that it would effectuate the policies of the Act to assert jurisdiction over petitioner.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Sec. 151, *et seq.*), are set forth in the Appendix to the Petition, pp. 19-20.

STATEMENT

A. The Facts Pertaining To Commerce

Petitioner, a Texas corporation, operates a plant at Corpus Christi, Texas, where it is engaged in the

manufacture, bottling, and distribution of the nationally advertised soft drink, Coca-Cola (R.I. 177; R.II. 2). During the year 1950, petitioner's sales were confined to the State of Texas. However, in the same period, it purchased, for use in its business, supplies valued in excess of $500,000. Approximately $125,000 of these purchases came to petitioner direct from points outside of Texas. (R.I. 177; R.II. 2.) The out-of-state materials received consisted of bottles, cartons and carton handles, coolers, and crowns (R.I. 177; R.II. 3).

Petitioner operates under a contract with the Coca-Cola Bottling Co. 1903 (hereinafter called Bottling 1903), one of six organizations in the United States through which The Coca-Cola Company (hereinafter called the Company) distributes Coca-Cola syrup (R.I. 178, 181; R.II. 9, 118-127).[2] Bottling 1903, in turn, is governed by another contract with the Company itself (R.I. 180; R.II. 129-148).

The contract between Bottling 1903 and the Company gives the former the exclusive right—within the State of Texas and parts of four adjoining States—to bottle Coca-Cola syrup and sell the bottled product. The Company further agrees to furnish a sufficient amount of bottling syrup to meet Bottling 1903's requirements, and licenses it to use the patent design Coca-Cola bottle and the name Coca-Cola. (R.I. 180-181; R.II. 137-140.) In re-

[2] The Company manufactures this syrup at various plants throughout the country. The syrup utilized by petitioner was manufactured at the Company's Dallas, Texas plant, from where, upon order by Bottling 1903, it was shipped direct to petitioner. (R.III. 41-42.)

turn, Bottling 1903 consents that, *inter alia*, it will: (1) bottle Coca-Cola in a prescribed manner; (2) not deal in any substitute product, nor vend Coca-Cola outside of the territory covered by the franchise; (3) buy all Coca-Cola syrup from the Company; (4) use only the distinctive Coca-Cola bottles and crowns; (5) vigorously push the sale of Coca-Cola, and make such additional investments in plant and equipment as may be necessary to meet demand; and (6) permit the Company to inspect its bottling premises (R.I. 181; R.II. 140-143). The contract also fixes the price per gallon to be paid for syrup, which includes 5 cents per gallon for advertising matter (R.II. 144).

Under the terms of this contract, Bottling 1903 is not required to do the actual bottling itself. It is authorized to license other companies within the territory for this purpose, and to sell to them (and to no one else) the syrup obtained from the Company (R.I. 181; R.II. 141-142, 145). "In order to promote the sale of Coca-Cola and enable the actual bottlers to compete with other beverages," the contract establishes the maximum price at which Bottling 1903 may resell the syrup to its licensees (R.II. 145).

The contract between Bottling 1903 and petitioner is one of the sub-licensing arrangements contemplated by the master agreement just described. Thereby, Bottling 1903 bestows upon petitioner, insofar as certain counties in Texas are concerned, its exclusive rights respecting the bottling and sale of bottled Coca-Cola (R.I. 178; R.II. 119-120). Re-

newing the pledges which the Company made to it, Bottling 1903 promises petitioner that it will grant no similar license to anyone else in the same territory, and that it will obtain sufficient syrup to meet petitioner's needs (R.I. 178; R.II. 120-121). In order to enable petitioner promptly to secure an adequate quantity of the distinctive Coca-Cola bottles and crowns and at reasonable prices, Bottling 1903 further promises that it will license a specified number of reputable firms to manufacture these supplies (R.II. 124-125).

In turn, petitioner—as did Bottling 1903 in its contract with the Company—agrees to all of the six conditions respecting the method of bottling Coca-Cola, the restrictions on the sale of substitute products, the purchase of syrup exclusively from Bottling 1903, and the efforts to keep pace with the demand for Coca-Cola (R.I. 178-179; R.II. 121-125) (see *supra*, p. 4).[3] It is further provided that petitioner's failure "to properly and vigorously push the sale of Coca-Cola" shall be grounds for termination of the contract (R. II. 125). Finally, the contract fixes the price at which Bottling 1903 shall supply syrup to petitioner, which price, not only includes a 5 cents per gallon allowance for advertising matter, but is subject to increase "in the same amount . . . as the same may be increased" between Bottling 1903 and the Company (R.I. 179; R. II. 122-123).

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[3] Petitioner ordered Coca-Cola advertising material through Bottling 1903, and representatives thereof made periodic inspections of petitioner's plant (R.I. 179; R. II. 12-13).

B. The Conclusions Of The Board And Of The Court Below

Upon these facts, the Board concluded that petitioner's operations affected commerce within the meaning of Sections 2(6) and (7) of the Act. The Board further concluded that it would effectuate the purposes of the Act to assert jurisdiction over these operations. In this connection, the Board found that, in view of the contract ties between petitioner, Bottling 1903, and the Company, petitioner's operations could be viewed as constituting an essential link in the multi-state operations of the Company for purposes of category three of the Board's "jurisdictional yardsticks."[4] (R.I. 183-185, 224-225.)

The Board held that petitioner had by varied means interfered with its employees' organizational rights in violation of Section 8(a)(1) of the Act, and had, in violation of Section 8(a)(3), discharged or laid off 8 employees because of their union activity (R.I. 154-167, 189-193, 205-213). The Board, accordingly, entered an appropriate

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[4] These yardsticks, which were promulgated by the Board in October 1950, to govern the exercise of its discretionary power to withhold the full measure of its legal jurisdiction, are set forth in *Sixteenth Annual Report of the National Labor Relations Board* (Gov't. Print. Off., 1952), pp. 15 ff. Category three encompasses establishments operating as an integral part of a multistate enterprise. See *The Borden Co.*, 91 NLRB 628; *Seven Up Bottling Co. of Miami, Inc.*, 92 NLRB 1622, 1623.

This Court has expressly indicated its awareness of these standards. See, *e.g.*, *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 685 n. 14; *Bus Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 392 n. 14.

order remedying these unfair labor practices (R.I. 167-172).

The court below filed a one-sentence *per curiam* opinion (R. 235) enforcing the Board's order in full. Petitioner's motion for rehearing on the jurisdictional grounds here asserted was denied without opinion (R.I. 237-241).

ARGUMENT

The petition for a writ of certiorari, which fails to distinguish between the issue of whether the Board has jurisdiction over petitioner as a matter of law, and the different issue of whether the Board's discretionary power in respect to the assertion of this legal jurisdiction was properly exercised (see *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 684), presents no conflict of decisions and no question warranting review by this Court.

1. An impact on commerce sufficient to give the Board legal jurisdiction existed here solely by virtue of the supplies, valued in excess of $125,000, which flowed directly to petitioner from other states.[5] Indeed, petitioner appears to concede that

[5] See, *e.g.*, *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U.S. 318, 325-326; *National Labor Relations Board* v. *Empire Worsted Mills*, 129 F. 2d 668, 669 (C.A. 2); *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 53 (C.A. 4), certiorari denied, 321 U.S. 795; *J. L. Brandeis & Sons* v. *National Labor Relations Board*, 142 F. 2d 977, 980-981 (C.A. 8), certiorari denied, 323 U.S. 751.

Without merit is petitioner's suggestion (Pet. 9-10, n. 6) that the Board is precluded from relying on these purchases because its decision, although specifically finding that they were made (R.I. 177), did not articulate their legal significance. In the light of the numerous precedents which clearly explain why a

the Board had such legal jurisdiction in its observation (Pet. 16) that Congress would not be "powerless to reach or to regulate even purely interstate business, such as petitioner's, if such regulation were necessary to effectuate a program of regulation of interstate commerce." For, as this Court has often recognized, Congress did decide that this was necessary "in order to protect interstate commerce from adverse effects of labor disputes," and, accordingly, by the Act, it "has undertaken to regulate all conduct having such consequences that constitutionally it can regulate." *Polish National Alliance* v. *National Labor Relations Board,* 322 U.S. 643, 647. See also, *National Labor Relations Board* v. *Fainblatt,* 306 U.S. 601, 606.

The additional facts found by the Board, concerning petitioner's linkage with The Coca-Cola Company's nationwide distribution system, related to the second, and distinct, issue of whether, assuming legal jurisdiction existed, it would effectuate the policies of the Act for the Board, in the exercise of its discretionary power, to assert such

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direct inflow of goods above the *de minimis* level itself gives the Board jurisdiction as a matter of law, "it would be a barren formality to require . . . repetition" of the "same reasons" in every case where such factor exists. *National Labor Relations Board* v. *Regal Knitwear Co.,* 140 F. 2d 746, 747 (C.A. 2), affirmed on another issue, 324 U.S. 9. Cf. *Group of Institutional Investors* v. *Chicago, M., St. P. & P.R.R. Co.,* 318 U.S. 523, 589. In *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80, the agency action was vulnerable because—unlike the situation here—the "gap" in the administrative decision could not be filled in by the principles of previously adjudicated cases.

jurisdiction here. As this Court has observed: "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." *National Labor Relations Board* v. *Denver Building and Construction Trades Council,* 341 U.S. 675, 684. And, as previously indicated *supra,* p. 6, n. 4, one of the criteria under the Board's administrative standards governing its discretion in asserting jurisdiction is whether the "local" business immediately before it can be regarded as constituting an essential link in a multistate operation.

Since petitioner's relation to other businesses is relevant to the Board's discretion in asserting jurisdiction rather than to its legal power, there is no conflict between the decision below and *National Labor Relations Board* v. *Bill Daniels, Inc., et al.,* 202 F. 2d 579, 586 (C.A. 6), Board's petition for a writ of certiorari pending, No. 81, this Term,[6] and *National Labor Relations Board* v. *Shawnee Milling Co.,* 184 F. 2d 57 (C.A. 10) (Pet. 9-16). In the *Daniels* case, the automobile dealers involved purchased their cars and parts from a Ford Motor Company plant *within the state.* While, as we shall argue in that case, this did not warrant the conclusion that the dealers' activities did not "affect commerce," the point of significance here is that in

[6] The same issue, decided differently by the Ninth Circuit, is involved in *Howell Chevrolet Co.* v. *National Labor Relations Board,* 204 F. 2d 79, certiorari granted, No. 34, this Term.

Daniels the Court of Appeals for the Sixth Circuit thought otherwise. There is nothing in that decision to suggest that, given the crucial fact here of purchases by petitioner directly from outside the state exceeding $125,000, the Sixth Circuit would doubt the Board's jurisdiction. The factor petitioner extracts from *Daniels* is the holding that the dealers there could not be viewed as an "integral part" of Ford's interstate business as a basis for giving the Board *power* over the dealers. Right or wrong, that holding in no way suggests that where, as here, the Board unquestionably has jurisdiction, it may not consider the company's relationship to other businesses in exercising its discretion as to whether to assert that jurisdiction. The same analysis applies to the *Shawnee Milling* case where, again, the Board's legal power, not merely its exercise of discretion, depended on the finding, rejected by the Tenth Circuit, "that a labor disturbance in the plant devoted wholly to intrastate operations would unduly burden the interstate operations at the other plant." *National Labor Relations Board* v. *Tri-State Casualty Insurance Co.*, 188 F. 2d 50, 52 (C.A. 10).

In sum, the cases relied on by petitioner, at best, hold no more than that, for purposes of determining whether legal jurisdiction exists, operations other than those immediately involved may not be considered. Obviously, therefore, these cases do not reach the different question of the weight the Board should give to these other operations in determining whether it would effectuate the policies

of the Act to assert a jurisdiction which otherwise exists. Accordingly, there is no conflict of decisions.

2. The Board's application of its administrative jurisdictional policy in this case presents no substantial question warranting review by this Court. As the court below has emphasized in prior cases, where a challenge to the Board's jurisdiction involves "the wise exercise of, but [not] the existence of, power," this is a matter which Congress has entrusted to the "discretion of the Board." *National Labor Relations Board* v. *Gulf Public Service Co.*, 116 F. 2d 852, 854-855 (C.A. 5); *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 183 F. 2d 451, 453 (C.A. 5). Similarly, the Ninth Circuit, in declining to review the propriety of the Board's exercise of its legal jurisdiction, has stated: "Providing the Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised." *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 383, certiorari denied, 341 U.S. 909. Reflecting the same view, the Second Circuit has concluded: "We should hesitate to say that we could have power ever to review" the Board's conclusion as to whether the situation was important enough for the exercise of jurisdiction; "but . . ., if there may be such situations, they must be frivolous beyond rational question. . . ." *International Brotherhood of Electrical Workers* v. *Na-*

tional Labor Relations Board, 181 F. 2d 34, 36 (Learned Hand, C.J.), affirmed, 341 U.S. 694. In view of these principles—and of the fact that, on the basis of the evidence (*supra,* pp. 3-5), there was, indeed, ample basis for the Board's conclusion that petitioner satisfied the "essential link" test of its jurisdictional yardstick—the court below properly accepted the Board's policy determination.

CONCLUSION

The decision below is not in conflict with the decisions of other courts, and it presents no substantial question warranting review. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

AMERICAN BOTTLING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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I. *The Board based its conclusion that petitioner's business "affected commerce" within the meaning of the Act, entirely on its finding that petitioner was part of a "multi-state enterprise."*

For the first time in the course of this litigation it is now suggested by the Government that the Board predicated its finding that it had "legal" jurisdiction over petitioner—*i.e.*, that petitioner was engaged in "commerce" within the meaning of the Act—on the ground that petitioner imported miscellaneous supplies valued at approximately $125,000 from outside the State of Texas, and that the Board's finding that petitioner served as "an essential link in a multi-state system of manufacture and distribution" was relevant only to the Board's discretionary determination to exercise the jurisdiction which

it thus derived from the petitioner's out-of-state imports. The Board's findings and rationale, however, as well as the pattern of Board holdings in other cases dealing with "multi-state systems," show conclusively that this belatedly concocted explanation is a fiction invented solely for the purpose of defeating review by this Court of the misconception of law upon which the Board in fact based its finding that petitioner is subject to the Act.

The jurisdictional findings made by the Trial Examiner were adopted *in toto* by the Board. Although these findings cover more than four printed pages in the official report (99 NLRB at 358-362), the item of imports is mentioned only once, in the first paragraph, in the course of summation of the terms of a stipulation entered into by the parties. The rest of the extensive findings are devoted entirely to demonstrating that petitioner functions as an "integral part of a multi-state enterprise."

In language too clear to admit of ambiguity the decision makes it plain that petitioner was found to be engaged in commerce within the meaning of the Act solely because of this finding that it was an "essential link" in a "multi-state enterprise." First the Examiner held (R. 183), that petitioner's contention that it was not subject to the Act was refuted by *Seven Up Bottling Co. of Miami*, 92 NLRB 1622, in which the Board decided that it would take jurisdiction "when an employer's operations, though local in character, form an integral part of a multi-state enterprise" (R. 183-184). Next, turning to petitioner's claim that the Board was powerless to assert jurisdiction under the rule enunciated by the Tenth

Circuit in *Shawnee Milling Co.*, 184 F. 2d 67 (C. A. 81), the Examiner said:

> "But this decision was handed down before the Board decided the "7-Up" case. Aside from that, the business of the employer in the *Shawnee* case could hardly be called an "integral part of a multi-state enterprise" in any sense, and that is the criterion applied by the Board.
>
> * * *
>
> "I hold that it will effectuate the policies of the Act to assume jurisdiction. Accordingly I find that the respondent is engaged in commerce within the meaning of the Act."

The *Shawnee* case, of course, had nothing whatever to do with the Board's discretion to decline jurisdiction. It holds that the Board cannot legally assert jurisdiction over a local enterprice on the ground that it is owned, controlled and operated by an interstate company. The Government (Br. in Opp. pp. 9-10) now purports to distinguish *Shawnee* on the ground that the local plant there involved had no out-of-state imports. But the critical point is that *the Board did not distinguish it on that ground.* The Board made no reference whatever to petitioner's out-of-state purchases in this connection, as the Trial Examiner's statement quoted above shows. *The Board decided this case in the teeth of Shawnee because it disagreed with the Tenth Circuit's holding.*

The Board has not heretofore attempted to make any secret of that disagreement, or of its legal theory that a company like Shawnee, which has no inter-

state inflow or outflow, is subject to the Act if only it is an "essential link" in a "multi-state enterprise" or is controlled by an interstate company. Nor has the Board tried to hide the fact that it regards the presence or absence of inflow or outflow as irrelevant in these "multi-state enterprise" cases. Thus, in *Metropolitan Life Ins. Co.*, 93 N.L.R.B. 381, the Board held that a local housing project was subject to the Act because it was owned by a large insurance company and served as an outlet for investment of the company's funds. Rejecting the employer's contention that the *Shawnee* decision was controlling the Board said:

> "Whatever the applicability of that decision, the Board, with due respect for the opinion of the Court of Appeals for the Tenth Circuit, is constrained to adhere to its original view until the Supreme Court of the United States has had an opportunity to pass on the question.

And in *Grinnell Bros.*, 98 N.L.R.B. 20, 21, the Board, again specifically repudiating *Shawnee*, held that a local retail music store was subject to the Act. The Board did not even mention whether or not the store had any out-of-state imports or exports. It bottomed its holding entirely on the fact that the same employer also owned 24 other stores and a piano factory.

The Board reiterated its policy of proceeding in conflict with the *Shawnee* decision in its *Fifteenth Annual Report*, p. 26, note 77, and in its *Seventeenth Annual Report*, p. 11, note 12.

Despite this unambiguous evidence that the Board predicated its finding that petitioner was "engaged in commerce within the meaning of the Act," exclusively on its "multi-state enterprise" theory, the Government's brief attempts to make it appear that that theory could have no application to the issue of "legal" jurisdiction because, allegedly, the "multi-state enterprise" concept is merely one of a set of "administrative standards" utilized by the Board in deciding whether or not to assert jurisdiction which it otherwise has. But the difficulty with this explanation is that the Board utilized the "integration" or "multi-state enterprise" theory as the basis for *acquiring* "legal" jurisdiction *before* it promulgated its allegedly self-denying jurisdictional policy standards. For example, the Board decided the *Shawnee* in which it held a local company subject to the Act solely because of its relationship with an interstate company, on April 19, 1949 (82 N.L.R.B. 1266, 1277-1278). The "jurisdictional standards" were not invoked by the Board until October, 1950. Nowhere in the standards or elsewhere, has the Board ever indicated that it considers its "integration" concept applicable only to local companies which independently do sufficient interstate business to bring them within reach of the Act.*

*Compare the Trial Examiner's rejection (R. p. 183) of petitioner's distinction of the *Seven-Up* case on the ground that there the local bottler purchased the syrup from outside the state. The Examiner did not suggest that petitioner's incidental out of state imports were relevant in this connection, but stated merely that he "cannot follow this distinction" because petitioner "is a mere distributing agency operating for * * * the syrup made by Coca-Cola Company."

Fully applicable here is this Court's statement in *Securities and Exchange Commission v. Cheney Corp.*, 318 U. S. 80:

> "The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order * * *.
>
> "* * * if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. * * *
>
> "* * * an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.

Moreover, in the *Daniels* and *Gilbert* cases (Pet. pp. 9, 11-12) the Board applied the "integration" theory where there was no "direct" inflow at all. In those cases the Board alternatively relied on the fact that the parts and supplies purchased locally by the dealers originated outside the state. But, as the decision of the Sixth Circuit makes clear, the Board there urged the "integration" theory in support of its jurisdiction, entirely apart from the "source of purchases" theory, and the Court explicitly rejected both grounds for the Board's holding (202 F. 2d p. 579 at 585).

The fact that the Board in those cases articulated both theories whereas in this case it referred to integration alone shows that the Board did not here

rely even alternatively on petitioner's out-of-state purchases. And the fact that the Board in the *Daniels* case urged "integration" in support of its "legal" jurisdiction demonstrates the invalidity of the Government's claim that the Board considers "integration" as bearing only on its discretionary policy with respect to the assertion of jurisdiction.

Petitioner's out-of-state imports played no greater part in the Board's decision in this case than Bill Daniel's direct out-of-state sales, valued in excess of $23,000 yearly, played in the Board's decision in the *Daniels* case. In both cases the fact was mentioned; in neither did it affect the Board's rationale.

II. *The Board is precluded by its own administrative standards from calling upon the Court to assert jurisdiction on the ground of "inflow."*

The Government's brief argues (p. 7, note 5) that the Board's failure to "articulate (the) legal significance" of petitioner's out-of-state purchases, or inflow, is a mere "gap" which can be "filled in by the principles of previously adjudicated cases." This argument has the erroneous premise that the Board actually considered inflow in reaching its conclusion as to commerce.

Very plainly, however, as demonstrated above, the Board is committed to the concept that an employer which it finds to be "an integral part of a multi-state enterprise" is subject to jurisdiction on this ground alone, and quite independently of the existence of other jurisdictional factors. Equally plainly, it has

been demonstrated that this is the only concept relied upon by the Board in asserting jurisdiction throughout the proceedings below.

The obvious question presents itself: if "legal" jurisdiction was to be found in the imports of petitioner, why did the Examiner and the Board never say so? Why did they pass over this supposedly fundamental concept, and resort to elaborate findings and argument to satisfy themselves that jurisdiction existed elsewhere?

The answer is not, as the Government implies, that jurisdiction by reason of inflow is too obvious to merit discussion, or that a "gap" was left in the jurisdictional findings by oversight. The answer is that it was not available to the Board to assert jurisdiction on this ground, because before and throughout these proceedings, the Board had renounced the assertion of jurisdiction on the ground of inflow alone unless annual imports amounted to at least $500,000. *Federal Dairy, Inc.*, 91 N.L.R.B. 638—one of the Board's 1950 jurisdictional "yardstick" cases. As the Board conceded in its brief in the Court below, "Petitioner did not meet the inflow test of the Board's jurisdictional yardstick." (Petition, p. 3, footnote.)

The Board now asks the Court to uphold jurisdiction on grounds which the Board itself has proclaimed to be insufficient to merit its assertion. Almost incredibly, a great administrative agency is inviting the Court to disregard the duly promulgated standards of that agency, to assert jurisdiction on grounds that the agency expressly rejects, and, in order to meet the exigencies of one case, to violate

the hard-won principle that the reviewing court will respect the standards established by the agency in its field.

This is not one of those cases in which it is claimed that the agency applied an administrative standard in an inconsistent manner, and in which the issue is the proper exercise of the discretion. The Board did not say, "We consider that we can properly assert jurisdiction here on the ground of inflow." It correctly disregarded inflow as a jurisdictional factor, and in this respect acted consistently with its own standards. Certainly the position of the Board is inconsistent, but the inconsistency lies not in the manner of its exercise of discretion, but in asking the reviewing tribunal to apply a standard which the Board itself considered inapplicable. The Board does not ask the Court to respect its discretion; it asks the Court to invade it. It demands that the Court assert "legal" jurisdiction in an area where it has itself renounced the assertion of jurisdiction, "legal" or otherwise. It is asking the Court to overturn its own consistent and administratively correct determination that jurisdiction on the ground of inflow should not be asserted.

Since under administrative standards it was proper and correct for the Board to reject inflow as a ground of jurisdiction, and since a correct and consistent administrative determination may not be upset upon review, the Board's strange request that the Court override its correct jurisdictional determination on the inflow issue may not be countenanced.

III. *The assertion of jurisdiction is based solely upon activities of other parties, not involving petitioner, which may not be considered.*

Since inflow may not be considered as a jurisdictional basis, the Board is relegated for a jurisdictional argument to its original and only contention, which is that jurisdiction is made out over petitioner as "an integral part of a multi-state enterprise." Petitioner is therefore clearly within the purview of the *Daniels* and *Gilbert* cases, and there is no jurisdictional factor affecting petitioner which is outside their rationale.

The elimination of inflow also means that the theory of petitioner as "an integral part of a multi-state enterprise" must afford the entire basis for jurisdiction, including what the Board terms "legal" jurisdiction, and cannot be relied on merely as a discretionary basis for assertion of jurisdiction whose "legal" basis is elsewhere to be found. That this theory is inadequate to this task is virtually conceded by the Board, which states in its brief in opposition (p. 8) that the evidence of petitioner's relationship to the Coca-Cola Company went to the "distinct" issue of whether jurisdiction should be asserted, "*assuming legal jurisdiction existed.*" Similarly, it is conceded (p. 10) that the authorities cited by petitioner do hold, as petitioner argues, that "for purposes of determining whether legal jurisdiction exists, operations other than those immediately involved may not be considered."

Divested of the inadmissible factor of inflow, and therefore without basis other than the concededly in-

sufficient theory of an "integral part of a multi-state enterprise," the Board's assertion of jurisdiction was an unwarranted assumption of authority over activities not affecting commerce under the Act.

CONCLUSION

For the foregoing reasons, and for the reasons heretofore stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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